Climate Control Corporation *and* Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO. Case 25-CA-12326

July 24, 1981

DECISION AND ORDER

On March 30, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions and a supporting brief and a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Climate Control Corporation, Muncie, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[1]

[1] The Administrative Law Judge's notice is inadvertently entitled "Notice To Members." We have substituted a new notice which is entitled "Notice To Employees."

APPENDIX

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail and refuse to bargain with Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO, with respect to the effects on our employees of our decision to close our operations.

WE WILL NOT fail and refuse to give our employees at least 24 hours' notice prior to their permanent layoff, as required by article X of our collective-bargaining agreement with the Union.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL make whole our employees by paying those employees who were laid off on June 6, 1980, when we terminated our operations, normal wages for a period specified by the National Labor Relations Board, plus interest.

WE WILL, upon request, bargain collectively with the Union with respect to the effects on our employees of our decision to terminate our operations, and reduce to writing any agreement reached as a result of such bargaining.

CLIMATE CONTROL CORPORATION

DECISION

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: This is the third round of Respondent Climate Control Corporation's recent bout with the protections afforded employees by Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* In June 1978, it signed a settlement agreement involving alleged unlawful threats and interrogation. In August 1980, the Board (251 NLRB 751) found that Respondent had engaged in threats of loss of benefits and threats to extend negotiations and to engage in appeals in order to discourage support of Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO (herein the Union), and that Respondent had denied full vacation benefits to an employee because he engaged in union activities and instigated and provided evidence in support of an unfair labor practice charge—all of which caused the Union to strike on July 18, 1978, and prolonged that strike.

The third round begins with events that transpired during the course of events which led to the Board's Decision. When the Union was certified as the collective-bargaining representative of Respondent's employees,[1] Respondent's president, John McNary, in negotiations, mentioned that he was looking to leave his business and retire, offering to sell the business to the Union. Those statements, or similar statements, constituted a theme for almost 2 years, through the strike, after the strike, and even after the Union and Respondent had finally agreed upon a labor contract on or about November 14, 1979. Finally, on June 6, 1980, Respondent ceased its business but, contends the General Counsel, without notice to the Union that Respondent definitively was to close its doors. On the other hand, McNary testified, supported by his former secretary, Thelma Reed, that on or about 10 days before the date Respondent closed McNary told Union Business Representative Richard Compton that Respondent would close on or about June 1.

That credibility conflict is critical because if the Union were so advised then it had the duty to request bargaining over the effects of the closure. If, however, there were no such notice, the Union would have been comforted with at least the notion that threats of closure had been made for over a year and that it did not take seri-

[1] Respondent admits, and I conclude, that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

ously those threats and had no legal duty to request bargaining. I find that this is what occurred and, in doing so, discredit the testimony of Reed and McNary to the contrary. At best, Reed was testy, at first testifying with utter assurance that McNary told Compton of the date of the closing. But, when subjected to cross-examination, she recanted, no longer recalling precisely the statement she first testified to;[2] she could not recall who was present; she could not recall with any precision the remainder of the conversation; and she testified to what she inferred was being said, rather than what was actually said. Further, she appeared to be biased in favor of McNary, for whom she had worked for at least 8 years;[3] and I found her recollections to be selective at best, faulty and unreliable at worst.

Nor do I credit McNary's strenuous averments that he gave Compton the required notice. Indeed, upon cross-examination, and in a letter McNary wrote to Compton on July 23, 1980, he corroborated Compton's account that at their last meeting prior to June 6 McNary once again made known his intention to close his business as soon as possible and that Compton requested that, if he were going to do so, McNary should notify Compton as soon as he could. McNary agreed to do so, but gave his notice only by letter of June 6, which announced that, and was mailed only after, the business had been closed. Compton received this letter early the following week and immediately requested bargaining about the effects of the closing. Respondent's two employees received the same letter on June 7 and had not been previously notified. In fact, employee Carl Van Matre, who worked on June 6, went out on a service call in the morning of June 7, being advised of the problem by Respondent's answering service, which had apparently not been discontinued. Van Matre received his notice of Respondent's closing only later that day, as did Richard Collier, Respondent's other employee.

It must be added that the closing on June 6 was no sudden event. A month or more before, McNary had agreed with John David Nixon, one of Respondent's stockholders, to sell him Respondent's inventory, trucks, and office equipment, pending Nixon's successful application for a loan. On May 11 or 12, Nixon told McNary that the loan application had been approved and, on May 14 or 15, that he had received the loan proceeds. That McNary refused to so state to Compton and instead sought to avoid further dealings with the Union by peremptorily terminating its operations without notice is indicative of McNary's motivation.

It is well settled Board law that, although an employer may close his business, the Act requires that the employer afford a union the opportunity to discuss the impact and effects of the closing on bargaining unit employees. *Merryweather Optical Company*, 240 NLRB 1213, 1214–15, fns. 2 and 3 (1979). Here, the decision to terminate was a *fait accompli* when Compton received McNary's June 6 letter. Compton wrote to McNary on June 12 and requested bargaining, but, by the time the letter was received at McNary's home, McNary had already left Muncie on an extended vacation. McNary replied by letter dated June 21, in which he blamed the Union for his business failure. He did not, however, state that he was ready to bargain about the effects of his action. By then, the Union had already filed its charge of unfair labor practice,[4] and, finally, when McNary returned in August 1980, he offered to and did commence negotiations with Compton. However, that talk was not fruitful because, *inter alia*, McNary came armed with a financial statement of November 1979, Compton wanted to examine Respondent's current books, and McNary stated that he would reply later to that request, but has not done so to the date of the hearing. Because of that fact, I find that McNary's offer to bargain in August 1980 was not made in good faith but was merely part of a continuing effort to avoid bargaining, to cast aspersions on the Union for Respondent's business failure, and to place on the Union the burden of providing a remedy for Respondent's closure.

Under all the circumstances, I find that Respondent has failed to bargain in good faith with the Union about the effects of its termination of operations upon the bargaining unit employees, in violation of Section 8(a)(5) and (1) of the Act.

Further, although not specifically pleaded as a separate violation, article X, section 2, of the parties' collective-bargaining agreement required that the Union should be notified of any layoff of five consecutive workdays at least 24 hours in advance of the layoff. Respondent clearly failed to comply with this provision, and I conclude that its failure to comply was a unilateral change in terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. Both unfair labor practices found are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth above, occurring in connection with its operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent failed to afford the Union an adequate opportunity to bargain about the effects of its closing on bargaining unit employees in violation of Section

[2] Reed was not present in the room with McNary and Compton, but allegedly heard the statement from the next room where she was sitting and through an open door.

[3] Reed admitted that, in testifying, she knew what McNary needed.

[4] The relevant docket entries are as follows: the charge was filed on June 20, 1980, and the complaint issued on July 29, 1980. The hearing was held in Muncie, Indiana, on March 4, 1981. Although both parties were afforded the opportunity to file briefs, only the General Counsel has done so. In that brief, the General Counsel moved to correct the Official Transcript in one respect. His motion is granted, and the record is corrected accordingly.

8(a)(5) and (1) of the Act, I shall recommend that Respondent be ordered to bargain with the Union concerning the effects of its closing on all bargaining unit employees. However, as in *Merryweather Optical Company, supra*, a bargaining order alone is an inadequate remedy because, now that Respondent has closed its business without notice, the employees no longer have any bargaining power. In order to create an atmosphere in which meaningful bargaining can be assured, some measure of economic strength must be restored to the Union.

Accordingly, I shall order Respondent to pay its bargaining unit employees amounts at the rates of their normal wages when last in Respondent's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following events: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on bargaining unit employees; (2) a *bona fide* impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of these employees exceed the amount the employees would have earned as wages from June 6, 1980, the date on which Respondent closed its operations, to the time they secured employment elsewhere, or the date on which Respondent shall have made a *bona fide* offer to bargain, whichever occurred sooner, provided, however, that in no event shall the sum be less than these employees would have earned for a 2-week period at the rates of their normal wages when last in Respondent's employ. Interest shall be paid in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5] I shall also recommend that a broad cease-and-desist order be entered in light of Respondent's proclivity for violating the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, including my observation of the demeanor of the witnesses, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[6]

The Respondent, Climate Control Corporation, Muncie, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO, with respect to the effects on its employees of its decision to close its operations.

(b) Failing and refusing to give its employees at least 24 hours' notice prior to its permanent layoff, as required by article X of its collective-bargaining agreement with the Union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole its employees by paying those employees who were laid off on June 6, 1980, when Respondent terminated its operations, normal wages plus interest for the period and in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Upon request, bargain collectively with the Union with respect to the effects on its employees of its decision to terminate its operations, and reduce to writing any agreement reached as a result of such bargaining.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail an exact copy of the attached notice marked "Appendix"[7] to the Union, and to all employees who were employed at its former place of business at 1330 West Second Street, Muncie, Indiana, on June 6, 1980. Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be mailed immediately upon receipt thereof, as hereinabove directed.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."